87-1259

Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
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No._____

IN THE

Supreme Court of the United States

October Term, 1987

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether petitioners have alleged a "pattern of racketeering activity" under RICO, 18 U.S.C. § 1961-68.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Eighth Circuit (Supreme Court Rule 21.1(b)).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Eighth Circuit denying rehearing, dated October 23, 1987 is not officially reported. The full opinion, decided September 22, 1987 is officially reported at 829 F.2d 648 (8th Cir. 1987). The opinions of the district court filed November 21, 1986 and February 10, 1987 are officially reported at 648 F. Supp. 419 (D. Minn. 1986).

The Eighth Circuit opinion denying rehearing is reprinted in the Appendix, beginning at A-1. The full opinion, filed September 22, 1987 is reprinted in the Appendix beginning at A-3. The district court decisions filed November 24, 1986 and February 8, 1987 are reprinted in the Appendix at A-25 and A-8 respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The judgment denying rehearing of the Court of Appeals for the Eighth Circuit was entered on October 23, 1987. This Petition is timely, having been filed within ninety (90) days of that date.

PROVISIONS OF STATUTE INVOLVED

The statutory provisions of Title 18, United States Code, added by Title IX (RICO) of P.L. 91-452, in relevant part, provides:

§ 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . section 1951 (relating to . . . extortion) . . . section 2314 . . . (relating to interstate transportation of stolen property) . . .

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period

of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

. . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections . . . (c) of this section.

The relevant statutory provisions contained in Volume 84 of the *Statutes at Large* at 947 provides:

Section 904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below.

This is a class action arising under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961-1968. Petitioners filed and served their Summons and Complaint on July 8, 1986. Plaintiffs' First Amended Complaint was filed and served on July 15, 1986. Petitioners alleged that respondents committed acts in violation of 18 U.S.C. §§1962(a), (b), (c) and (d). In addition to federal claims, petitioners alleged state law violations pursuant to the court's pendant jurisdiction which consisted of acts of bribery and contravention of Minn. Stat. §609.42, subd. 1(1) and (2) and common law bribery.

Oral arguments were heard in the district court on October 1, 1986. By Order dated November 21, 1986, the court granted defendant Northwestern Bell Telephone Company's (Northwestern Bell) motion to dismiss the Complaint in its entirety on the grounds that the plaintiffs had failed to allege a "pattern" of racketeering activity and, on the 1962(a) count, the fact that there was no person/enterprise distinction. In addition, the court found that under the "filed rate" doctrine, plaintiffs' cause of action was not federally cognizable.

Petitioners filed a motion to amend or reconsider on December 3, 1986. On February 10, 1987, the District Court denied the Motion to Reconsider. Petitioners appealed to the Eighth Circuit on March 20, 1987. Oral arguments were heard in the 8th Circuit on September 2, 1987 and the Opinion was

filed on September 22, 1987, affirming the trial court's dismissal of petitioner's Complaint in that petitioner's had failed to allege a RICO pattern of racketeering activity. On October 23, 1987, petitioners petition for rehearing en banc, filed October 4, 1987 was denied. Petitioners now seek certiorari.

B. Factual Allegations.

Unlike many RICO claims, this case does not involve "garden variety" fraud allegations. Petitioners allege that from January 1, 1980 through the present Respondent Northwestern Bell conducted a number of schemes in which it attempted to, or did, bribe commissioners of the Minnesota Public Utilities Commission. These bribes included the payments of over a hundred thousand dollars to commissioners. In one of these schemes payments were made through a middle man, and were hidden in the defendant's records as "attorney fees." In another scheme employment negotiations took place with a sitting commissioner resulting in over $100,000.00 in "consulting fees" within a year after leaving the commission. In another scheme, parties, gifts, and meals were paid by respondent for commissioners, the frequency of which rose dramatically during critical votes on rate increases; these votes resulted in increases well beyond the amounts recommended by administrative law judges. Despite the pleading of these and other schemes, district and circuit courts found that only one scheme existed; and that more than one scheme was necessary for a pattern.

Petitioners seek to recover compensatory damages and allege that the compensation Northwestern Bell received was excessively unfair and unreasonable. These excessive charges were caused by the involvement of bribery, attempts to bribe, conspiracy and the other racketeering activities alleged. Petition-

ers also seek, as a class action interest, reasonable attorneys fees, punitive and treble damages. Petitioner also applied for an injunction preventing respondents from engaging in further illegal activity and other relief as the Court deems just and proper.

REASONS FOR GRANTING THE WRIT

In order to establish a RICO cause of action, four elements must be proven. These elecents are 1) conduct, 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985). Of these elements, at issue in the case at bar is whether petitioners' Complaint satisfies an essential element of the civil RICO cause of action by showing that the defendants had engaged in a pattern of racketeering activity. Under RICO, a pattern "requires at least two acts of racketeering activity, one of which occurred after the effective date of this Chapter and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering activity. . . ." 18 U.S.C. §1961(5). In *Sedima*, this Court indicated that in order for there to be a pattern, there must be a factor of "continuity plus relationship." This Court in dicta stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provision in §1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a

> pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

Id. at 496, n. 14.

Footnote 14 has been used to fashion a definition of the term "pattern." However, by focusing on the wording "continuity plus relationship", courts have arrived at extremely different interpretations of whether a pattern exists. Courts have created three approaches in defining a pattern for RICO purposes. These are the "liberal approach," the "restrictive view" and the "moderate" or "flexible view." *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278, 1285-86 (D. Virgin Islands 1987). *See also* Alexia Morrison, *RICO's "Pattern" Requirement: Where the Lexicon Went Wrong* 3 Civil RICO Report No. 27 at 7 (Dec. 8, 1987). (Defines approaches by court at the "expansive view," the "narrow view" and the "middle road.") In *Morgan v. Bank of Waukegan*, 804 F.2d 970, 974 (7th Cir. 1986), the court noted that the pattern requirement in the aftermath of footnote 14 of *Sedima* has created a conflict among the circuit courts.

This conflict has led to chaos in interpretations of RICO. None of the opinions of the circuit or district courts which endorse differing approaches can be reconciled. Although *Sedima* rejected attempts to limit the scope of RICO, *Id.*, the federal courts have viewed footnote 14 as a signal to fashion a limiting construction around the pattern requirement. *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 38 (3rd Cir. 1987). Indeed, 58.6% of the reported decisions

since *Sedima* have dismissed civil RICO complaints on various defendant motions. Of these decisions, 40.4% were dismissed due to conflicting definitions of pattern. 2 Civil RICO Report No. 44 at 7 (April 14, 1987).

Circuit court interpretations have not only caused conflict among the circuits but have also led to specific rejection of the approach of the Eighth Circuit which falls under the "restrictive" or "narrow" view. It is clear that in those courts which have rejected the Eighth Circuit's approach, the instant case would survive a RICO pattern challenge and Petitioners would be allowed to proceed with their claim. Petitioners therefore request that this Court resolve the conflict among the circuits in their interpretation of the RICO pattern requirement and reject the Eighth Circuit's scheme requirement.

I. CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS AMONG THE CIRCUITS REGARDING THE INTERPRETATION OF THE RICO PATTERN REQUIREMENT, THE CONSEQUENCE OF WHICH IS UNEQUAL TREATMENT OF RICO PLAINTIFFS.

A. Circuit courts have developed three approaches to the pattern requirement.

As previously stated, although *Sedima* did not directly address the definition of pattern for RICO purposes, in footnote 14 this Court laid groundwork for the Circuit and District courts to interpret this pattern requirement. Since *Sedima*, three approaches have evolved in interpreting the pattern requirement causing pronounced conflict among the circuit decisions. These approaches have been identified as the "liberal" or "expansive view," the "restrictive view" or "narrow view," and the "moderate view" or "middle road view." See,

Lawaetz, 653 F.Supp. 1278, 1285-86 (D. Virgin Islands 1987); *Morrison*, 27 Civil RICO Report at 7 (Dec. 8, 1987). A review of these three approaches will demonstrate the opposite views that courts have taken.

1. The expansive or liberal view.

The most liberal approach has held that two related acts constitute a pattern when committed in furtherance of a single episode or a scheme. *Lawaetz*, 653 F. Supp. at 1286. Typical of this view is *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986) where the court held that "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes §1962(c) to include are satisfied." *See also, Bank of America Nat'l Trust and Savings Ass'n v. Touche Ross and Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (nine acts of wire and mail fraud involving same parties over a period of three years sufficient to satisfy the pattern requirement); *R.A.G.S. Couture Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) (two related acts of mail fraud are sufficient to form a pattern).

2. The restrictive or narrow view.

The restrictive view holds that a pattern must be comprised of multiple separate criminal "schemes" or "episodes." *Lawaetz*, 653 F.Supp. at 1286. The 8th Circuit has noted that *Sedima* requires a showing of relationship plus continuity. The relationship prong is met when two or more racketeering acts are committed in pursuit of the same scheme. *See, Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). The District and Circuit court in the instant case found that the relationship prong had been met. However in order to estab-

lish a pattern, the continuity prong must also be proven. It is the continuity portion of the pattern requirement that the Eighth Circuit found was lacking in appellants' complaint. In order to demonstrate the necessary continuity, the Eighth Circuit has found that a plaintiff must show that the defendant "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." *H.J. Inc. v. Northwestern Bell*, 829 F.2d 648, 650 (8th Cir. 1987), *quoting Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986). The court noted that one fraudulent effort or scheme was insufficient to show a pattern. *See, Id.*

3. The flexible or middle road approach.

The flexible or middle road approach involves the analysis of a number of factors to determine whether a pattern has been alleged. "The key is to plead a persistent course of conduct and either a single ongoing scheme or multiple episodes may suffice if these acts are also related." *Lawaetz*, 653 F.Supp. at 1287 (citations omitted). The factors that are to be considered include the number and variety of the predicate acts, the number of victims of the alleged activity, the length of time of the activity, the number of participants in the alleged crime, the occurrence of distinct injuries, the purpose of the criminal activity, the result of the criminal activity, the number of transactions, and whether the scheme is ongoing and open-ended. *See, Id.* at 1286; Morrison, 23 Civil RICO Report at 8. Indeed, Morrison has suggested that the factors enumerated in this approach "mirror those of *Sedima's* footnote 14, which is based on the 'pattern' definition found in 18 U.S.C. §3575(e)." Morrison, 23 Civil RICO Report at 8.

In attempting to define pattern then, the circuit and district courts have evolved three separate versions of the pattern requirement. In doing so courts have not just implemented

their own interpretation of the pattern requirement, but have severely criticized other circuits' opinions. Especially criticized has been the Eighth Circuit's approach.

B. The Eighth Circuit's "multiple scheme requirement" is in conflict with *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), with the RICO statute itself, and with other circuit and district courts decisions, and should be reversed.

The First, Second, Third, Seventh and Ninth Circuits have specifically criticized and rejected the Eighth Circuit's multiple scheme test under RICO. District courts from the Third, Fourth and Fifth Circuit have also followed suit. Their criticism is that the Eighth Circuit's requirement is in conflict with *Sedima*, with the RICO statute itself, with legislative intent, and that the results under a multiple scheme test are contrary to the goals of the statute.

One of the most recent cases to discuss the RICO pattern requirement in relation to the Eighth Circuit is *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987). In discussing the positions taken by post- *Sedima* courts, it characterized the Eighth Circuit as holding that a series of predicate acts related to one fraudulent scheme or criminal episode would not constitute a pattern. *Id.* at 192, *citing Superior Oil Company v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) *Dierdorff* also took note that the Seventh and Eleventh Circuits have held that a series of predicate acts related to one fraudulent scheme or criminal episode may constitute a pattern, but the predicate acts must be "continuous." *Id.* The court then stated: "We agree with the Seventh and Eleventh Circuits that it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under *Sedima*." *Id.* at 193. It further stated that there is "no sound basis for the

view taken by some courts that a pattern requires more than one 'fraudulent scheme' or 'criminal episode'." *Id.* The court found that requiring a plaintiff to show that the predicate acts are somehow both related and again sufficiently unconnected in time was not supported by the language in RICO itself nor in *Sedima*: "Requiring temporal unconnectedness, i.e., separate acts, makes sense, but neither RICO's language nor *Sedima's* interpretation of it supports a requirement of substantive unconnectiveness, i.e., separate episodes or schemes." *Id.* (footnote omitted). The court further went on to note that the effects of requiring such a balance would only "forestall RICO claims that are legitimate under the RICO Act itself, it's legislative history, and the Supreme Court's interpretation of the Act." *Id.* at 194.

The First, Third and Seventh Circuits have also explicitly rejected the Eighth Circuit's multiple episode test. See, *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) ("We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode."); *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987) (rejecting position that a RICO pattern must involve at least two distinct schemes in that it would exempt those who engage in only one unlawful scheme which is contrary to the purposes of the statute); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) ("the proposition that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule.")

The Second Circuit in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986) has also criticized pattern requirement adopted by the Eighth Circuit. The *Ianniello* court cited

Superior Oil v. Fulmer in discussing that the Eighth Circuit required as part of its definition of pattern proof that the defendants engaged in more than one scheme. The court concluded that "forcing such a result from the word 'pattern' is a strained and inappropriate reading of the statutory language." *Id.* at 192. It also felt that requiring multiple schemes would undercut § 1962(b). Provision 1962(b) prohibits predicate acts that are aimed at taking over an enterprise rather than focusing on an enterprise that is committing predicate acts. *Id.* The court stated that if two schemes were required as part of the definition of pattern under §1961(5), it would effectively eliminate §1962(b). *Id.* The court therefore declined to accept such an "incongruous result" and held that when a person commits at least two acts having a common purpose of furthering a continuing criminal enterprise the elements of relativeness and continuity required by *Sedima* are satisfied.

The *Ianniello* court also noted that the multiple scheme requirement was neither grounded in the statutory language of RICO nor was there any clear legislative history to indicate that, for example, because mail fraud is listed as a predicate act, it means only "scheme like" fraud. *Id.* at n.16. The court felt that imposing such an element "violates the Supreme Court's admonition against adding requirements not grounded in the statute or the legislative history." *Id.*

The Eleventh Circuit, in addition to the First, Second, Third, Seventh and Ninth Circuits, is also in conflict with the Eighth Circuit's pattern requirement. In *Bank of America v. Touche Ross and Co.*, 782 F.2d 966 (11th Cir. 1986) the Eleventh Circuit rejected the proposition that the predicate acts must occur in different criminal episodes or schemes in order to satisfy the pattern requirement. Therefore, the First, Second, Third, Seventh, Ninth and Eleventh Circuits are all

therefore in conflict with the Eighth Circuit in its interpretation of the pattern requirement in a RICO claim.

In addition to the Circuit courts, district courts from the Third, Fourth and Fifth Circuits have also criticized the Eighth Circuit's scheme requirement. In *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278 (D. Virgin Islands 1987), the court rejected the Eighth Circuit's requirement for pattern as "legally unsupportable" stating that "RICO's language and legislative history are devoid of a multiple episode requirement." *Id.* at 1286. It also cited *Sedima* for the view that it "admonishes against placing reactionary judicial restrictions on civil RICO plaintiffs" and that the RICO statute must be liberally construed in order to effectuate its remedial purposes. *Id.* at 1286-87.

Similarly, in *United States v. Madeoy*, 652 F.Supp. 371 (D.D.C. 1987), the Eighth Circuit's multiple scheme test as enunciated in *Superior Oil v. Fulmer* was rejected. The court found that a single conspiracy or scheme may also constitute a pattern of racketeering activity. *Id.* at 379. The court reached this conclusion after reviewing the relevant authorities and evaluating the underlying reasoning.

In *Louisiana Power and Light v. United Gas Pipe Line*, 642 F. Supp. 781 (E.D. La. 1986), *Superior Oil* was also cited in a discussion of the positions courts have taken regarding the RICO pattern requirement. The *Louisiana Power* court felt that the interpretation of the statute posed by *Superior Oil* was clearly wrong. The court criticized the result of the requirement of multiple criminal schemes; that is that a defendant who committed a series of acts in furtherance of a single criminal scheme could not be sued for RICO damages. *Id.* at 808. The court also stated:

> The problem I find in these cases is that to require the plaintiff to prove multiple schemes narrows the reach of the statute too far. The *Fulmer* case would require a plaintiff to prove that the defendant had defrauded or intended to defraud not only the plaintiff but others as well. *Fulmer*, at 257. But surely the plaintiff would not have standing to investigate or raise the issue of criminal activities which injure others. Such conduct neither damages nor threatens the plaintiff, and so, is simply not relevant to the plaintiff's suit. And if the plaintiff has no standing to raise the issue, it will never be able to make out a RICO claim under *Fulmer*, because it will never have the opportunity to prove the defendant's criminal injury of third parties. I refuse to place the RICO plaintiff in such a Catch-22.

Id. at 808-09.

It is clear that the circuit and district courts are not just divided in their definition of pattern, but are in totally opposite and irreconcilable positions. This places RICO plaintiffs in the untenable situation of having their RICO claim upheld not based on its merits, but based on the jurisdiction within which it is brought. This is made more clear in the instant case where almost any circuit other than the Eighth would not have dismissed appellants' complaint.

C. Petitioner's Complaint would be upheld in other circuits.

It is clear that under the views discussed other than the narrow view, petitioner's complaint would have withstood a RICO pattern challenge. Case law in the Second, Third, Fifth, Seventh, Ninth, and Eleventh Circuits indicate the plaintiffs would have been allowed to proceed with their complaint.

In *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), the court rejected the Eighth Circuit's multiple scheme ap-

proach and held that "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes §1962(c) to include are satisfied." *Id.* at 192. *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3rd Cir. 1987) upheld a complaint where two acts of mail fraud were alleged. The court specifically rejected the Eighth Circuit's multiple "scheme" requirement, noting that the term "scheme" is difficult to define and that a rule requiring multiple schemes would exempt defendants from RICO liability who engaged in one scheme, no matter how extensive or injurious. *Id.* at 39. In *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), the court found that the two alleged acts of mail fraud were related and therefore constituted a pattern. *Id.* at 1355. Here, where over thirty acts are alleged, there is no doubt that in the Second, Third and Fifth Circuits, Appellants' Complaint would stand.

Similarly, in *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), plaintiffs had alleged that defendants committed several acts of mail fraud over a period of several years in furtherance of an overall scheme to defraud the plaintiffs. The court found that these acts were distinct, some related to two separate foreclosure sales that occurred two years apart while others related to fraudulent statements made in connection with the initial loan transaction. The court found that under the facts, plaintiffs had satisfied both the continuity and relation aspects of the pattern requirement stating that although the acts could be viewed as part of a grand single scheme, they were also ongoing over a period of nearly four years. *Id.* at 976. In *Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), a savings and loan brought an action against its former president, alleging that

defendant had written four letters to various entities to cover up a scheme of receipt of kickbacks from Sun's customers. The court found that such activity satisfies the pattern requirement. Finally, in *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), the court found that under *Sedima* the pattern requirement was satisfied where the banks alleged nine separate acts of wire and mail fraud involving the same parties over a period of three years the purpose of which was to induce the banks to extend credit to International Horizons. *Id.* at 971. These cases indicate that the facts in the case at bar constitute a sufficient pattern under RICO in the Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits.

Petitioners' complaint alleged a number of separate bribery actions by respondent Northwestern Bell with Commissioners of the Minnesota Public Utilities Commission. These acts were ongoing over a period of two to three years involving different commissioners, different perpetrators and different racketeering acts. Thus, in six circuits other than the Eighth Circuit, petitioner's case would not have been dismissed. In addition, other circuits have criticized the position of the 8th Circuit and rejected the multiple scheme test. This Court must therefore redefine the pattern requirement in order to promote uniformity of application to all RICO plaintiffs.

II. THIS COURT SHOULD REDEFINE AND STANDARDIZE THE PATTERN REQUIRED UNDER RICO IN ORDER TO ENSURE THAT CRIMINAL PROSECUTIONS ARE NOT DISMISSED.

In addition to civil penalties, RICO also authorizes criminal sanctions. RICO is considered to be the prosecutors' main weapons in organized crime, political corruption, white collar

crime, and terrorism prosecutions. Oversight on Civil RICO Suits: *Hearings before the Senate Judiciary*, 99th Cong., 1st Sess. 106, 109-11 (1985) (testimony of Assistant Attorney General Steven Trott). Because of varying interpretations of the pattern requirement in the circuit courts, however, prosecutors will face the probability that criminal RICO defendants will be relieved of criminal liability under the statute. Prosecutors and defense counsel, as well as civil litigators, need authoritative guidance from this Court to bring order out of the conflicting interpretations and ensure that RICO is given its proper place in prosecuting criminal defendants.

The probability of dismissal of RICO criminal defendants is no more readily apparent than in the Eighth Circuit. In the recent case of *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987), the defendants were tried on a 13 count indictment. Count I alleged a RICO conspiracy charging that the defendants conspired to conduct or participate in the conduct of a drug enterprise's affairs through a pattern of racketeering activity. Count II charged the defendants with conducting or participating in the conduct of a drug enterprise's affairs through a pattern of racketeering activity. The other counts involved conspiracy to import marijuana, conspiracy to distribute marijuana, conspiracy to import and distribute cocaine and quaaludes, traveling in interstate commerce to promote unlawful activity, possession with intent to distribute cocaine, using a telephone to facilitate marijuana exportations and distribution, interstate travel to promote marijuana exportation and distribution, transportation of Canadian currency to the United States without reporting it, and conspiracy to obstruct the Internal Revenue Service in the collection of taxes. *Id.* at 853. The court found that a pattern of racketeering activity did exist even under the Eighth Circuit restrictive view:

> Here we think it clear that even our more restrictive view of the pattern requirement has been met, for there is evidence of not two but three separate schemes: first, there was a scheme to import marijuana into La Junta; second, there was a cocaine-and-quaalude scheme; and third, there was a scheme to import marijuana into the Phoenix area.

Id. at 858. The *Kragness* court found liability under the RICO statute. However, it is clear that had there only been one scheme to sell only one drug, to import marijuana for example, these defendants would not have been subject to RICO liability despite repeated criminal acts to further that scheme. No doubt, the *Kragness* case will limit the application of criminal RICO in the Eighth Circuit.

This is even more clear in view in context with the current case. Respondents here have not been criminally indicted. However, the Eighth Circuit has found that there was only one scheme—that of attempting to bribe the Minnesota Public Utilities Commission. Petitioners alleged numerous individual acts of bribery. However, it is clear that if the criminal indictments were ever made in this case, under *Kragness*, none of the respondents would be subject to RICO criminal liability. Any jurisdiction following the view of the Eighth Circuit will be faced with the same dilemma.

The RICO statute must be read to include not only the civil, but also the criminal sanctions. Even if the courts chose to make a distinction between the civil and criminal standards for a RICO pattern, this would not be allowable. Criminal defendants would surely protest such a distinction on constitutional grounds because of the conflicting applications of RICO. Therefore the Eighth Circuit cannot ignore the fact that the meaning of the term "pattern" must be the same in both civil

and criminal proceedings. *See, Northern Securities Company v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J. dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.").

It is clear that guidance from this Court is needed to ensure an even application of the RICO pattern requirement in all criminal and civil proceedings. This is especially true if this Court wishes prosecutors to retain a valuable tool in fighting crime.

III. A DECISION ON THE RICO PATTERN WOULD HAVE NATIONAL SIGNIFICANCE ON BOTH THE FEDERAL AND STATE LEVELS.

This Court should define a single standard for interpretation of the RICO pattern requirement. Such a decision will have an effect on both the federal and state levels. In federal courts, the federal RICO interpretation for the RICO pattern requirement has been applied to state RICO or other similar state statutes without discussion of the state's statutory intent or purpose. For example, in *Mills v. Fitzgerald*, 668 F.Supp. 1554 (N.D.Ga. 1987), an action was brought under the federal RICO act as well as under the Georgia Racketeer Influenced Corrupt Organizations Act. The action was based on misrepresentations of fact, fraud and inducement to buy interests in limited partnership. The court dismissed the claim on pattern grounds. It applied the Eleventh Circuit pattern requirement, stating that the Georgia RICO act contained "substantially the same language" as the federal RICO statute. *Id.* at 1561. The court noted that the Georgia RICO statute considered violations of the "Georgia Securities Act of 1973" predicate acts. Such acts are not enumerated under the federal RICO statute, and the court did not discuss these violations in relation to the

pattern requirement contained in the Georgia RICO Act, although the plaintiffs complaint alleged "federal and Georgia securities fraud." *Id.* at 1561.

Similarly in *Behunin v. Dow Chemical Co.*, 650 F.Supp. 1387 (D. Colo. 1986), the court dismissed plaintiff's RICO action upon the finding that there was only one scheme. The court found that the Colorado Organized Crime Control Act, Colo. Rev. Stat. §18-17-104 was modeled after federal RICO, and contained a pattern requirement. In spite of the fact that Colorado courts had not yet construed the pattern requirement, the *Behunin* court found the requirement was the same as the federal requirement and dismissed the claim accordingly. *Id.* at 1390.

Other courts have not discussed whether the state court has had an opportunity to interpret their own statutes but have simply found that the two acts were to be interpreted in the same manner. *See, Environmental Tectonics Corp. International v. W. S. Kirkpatrick & Co.*, 659 F.Supp. 1381, 1391 n.8 (D.N.J. 1987) (provisions of New Jersey Act to be interpreted in same way as federal RICO act); *Cook v. Zions First National Bank*, 645 F.Supp. 423, 427 (D. Utah 1986) (Utah Racketeering Influences and Criminal Enterprise Act (RICE) Utah Code Ann. §76-10-1603 and RICO not aimed at type of activity enumerated in plaintiff's complaint); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F.Supp. 92, 99 (D.Or. 1985) (court interpreted Oregon RICO in same fashion as federal RICO and dismissed claim).

An interpretation and definition of the pattern requirement under RICO by this Court will have national significance on both the federal and state level. This Petition provides the opportunity for this Court to ensure a uniform application of RICO at all levels of the judiciary.

CONCLUSION

Resolution of the foregoing problems is needed by this Court. The instant case is an ideal case to effectuate that resolution. This, unlike many RICO actions, is not a garden variety fraud case—rather it involves most serious allegations of bribery of governmental officials. These acts of bribery involve different people, different times, and had different objectives. This Court must once again restore a rule of law to the RICO statute. Only by so doing will the current rule of confusion be ended.

Dated: January 20, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

No. 4-86 Civ 546
Clerk's Notice under
Rule 77(d) F. R. Civil Procedure

H.J., INC., et al.,
Appellants-Plaintiff,
vs.
NORTHWESTERN BELL, et al.,
Appellees-Defendant.

You are hereby notified that in the above-entitled cause, on the 12th day of Nov., 1987.

We filed,

CERTIFIED COPY OF MANDATE FROM THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

CERTIFIED COPY OF JUDGMENT THAT: After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

FRANCIS E. DOSAL, Clerk
By: S.J.L.
Deputy Clerk

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121MN

H. J. INC., etc., et al.,

Appellants,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, etc., et al.,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 23, 1987

Order entered at the Direction of the Court:
Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5121

H. J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISSAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Appellants,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U. S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed co-conspirators,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: September 2, 1987
Filed: September 22, 1987

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal from the district court's[1] order dismissing their complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 648 F.Supp. 419, 430 (D. Minn. 1986). Appellants' complaint alleged, *inter alia*, violations of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1961-68 (RICO). We affirm.

Because appellants' complaint was dismissed pursuant to Rule 12(b)(6), we view the facts alleged in their complaint in the light most favorable to them. *Bennett v. Berg*, 685 F.2d 1053, 1057-58 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983). The gravamen of appellants' complaint is that appellee Northwestern Bell Telephone Company undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory body responsible for determining the rates which Northwestern Bell may charge. Appellants claim that Northwestern Bell sought to influence individual MPUC commissioners by various methods including cash gifts, employment offers, tickets to sporting and cultural events, airline tickets, meals and parties. Appellants allege a series of episodes beginning in 1980 and claim the practices continue through the present. The district court dismissed appellants' RICO claims for failure to allege a pattern of racketeering activity. *H. J. Inc.*, 648 F.Supp. at 423-26.

The core requirement for a RICO violation is a pattern of racketeering activity. 18 U.S.C. § 1962. *See, Sedima, S.P.R.L. v. Imex Co.*, 105 S.Ct. 3275, 3287 (1985). At the minimum, at

[1] The Honorable Harry H. MacLaughlin, United States District Judge, District of Minnesota.

least two acts of racketeering activity[2] are required to establish a pattern. *Sedima*, 105 S.Ct. at 3285 n.14. However, "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" *Id.* Prior to *Sedima* the pattern requirement could be met by simply pleading two acts of racketeering activity. *See, Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255-56 (8th Cir. 1986). In *Sedima* the Supreme Court chastised Congress and the courts for failing to develop a workable definition of "pattern" which would limit the abuse of civil RICO. *Sedima*, 105 S.Ct. at 3287. Accordingly, this circuit has undertaken more meaningfully to construe the concept of "pattern."

We have followed the *Sedima* Court's intimations and have required the combination of continuity plus relationship to establish the necessary pattern. *Superior Oil*, 785 F.2d at 257. *See Holmberg v. Marrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987). "The term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan), *quoted in Sedima*, 105 S.Ct. at 3285 n.14. The relationship prong is met when two or more racketeering acts are shown to be in pursuit of the same overarching scheme. *See Holmberg*, 800 F.2d at 210; *Superior Oil*, 785 F.2d at 257. The district court found that appellants' complaint satisfied the relationship prong. *H. J. Inc.*, 648 F.Supp. at 425. We agree.

The burden of establishing the continuity prong has proven more onerous. "The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally re-

[2] "Racketeering activity" has been defined to include a broad range of criminal offenses. 18 U.S.C. § 1961(1).

quires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p.158 (1969), *quoted in Sedima*, 105 S.Ct. 3285 n.14. In order to demonstrate the necessary continuity appellants must allege that Northwestern Bell "had engaged in similar endeavors in the past or that [it was] engaged in other criminal activities." *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 329 (8th Cir. 1986). A single fraudulent effort or scheme is insufficient. *Id. See also Ornest v. Delaware North Cos.*, 818 F.2d 651, 652 (8th Cir. 1987) (single scheme over eight years to defraud plaintiffs of sales commissions); *Madden v. Gluck*, 815 F.2d 1163, 1164 (8th Cir. 1987) (defendant engaged in a vast array of fraudulent activities in pursuit of a single goal to keep a company afloat in order to loot it). Appellants' complaint alleges no more than a series of fraudulent acts "committed in furtherance of a single scheme to influence MPUC commissioners. . . ." *H. J. Inc.*, 648 F.Supp. at 425.

The district court did not err in finding that appellants' complaint failed to satisfy the continuity prong as articulated in this circuit.[3] Therefore, because dismissal was appropriate under Rule 12(b)(6), we do not address the other issues raised in this appeal. The decision of the district court is affirmed.[4]

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[3] We are aware that our continuity plus relationship approach to the pattern requirement is not without criticism. *See Sun Savings & Loan Association v. Dierdorff*, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987); *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986).

[4] Appellants also alleged in their complaint pendent state law claims which were dismissed by the district court when the basis for pendent jurisdiction (the RICO claim) was dismissed. At oral argument the court was advised that state court proceedings had been or were to be initiated. We, of course, do not reach any such claims in this opinion.

McMILLIAN, Circuit Judge, concurring.

I fully concur in the decision to affirm the district court's dismissal of the complaint for failure to satisfy the continuity prong of the pattern of racketeering activity test adopted by this circuit. I write separately only to state that I agree with Judge John R. Gibson that we should reconsider our pattern of racketeering activity test, in light of the contrary positions recently taken by several other circuits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the court's opinion because I am satisfied that this result is compelled by our earlier cases commencing with *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). In *Henning v. First Bank of Worthington*, No. 86-5320 (8th Cir. July 7, 1987), I concurred separately and expressed my view that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO. The Second and Seventh Circuits, and now the Ninth Circuit, as well as numerous district courts and a respected scholar in this field, have criticized our position.[1]

I believe, as stated in my separate concurrence in *Henning*, that when a proper case arises the multiple scheme requirement should be examined by the court en banc.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1] *See Henning, supra*, footnote 5, and *Sun Savings & Loan Assn. v. Dierdorff*, No. 86-5811, 56 U.S.L.W. 2110 (9th Cir. Aug. 7, 1987).

APPENDIX D

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

Civil 4-86-546

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Plaintiffs,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

MEMORANDUM AND ORDER

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402, for defendants.

This matter is before the Court on plaintiffs' motion to reconsider. Plaintiffs' motion will be denied.

FACTS

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs also bring a state law claim pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery. By order dated November 21, 1986, the Court granted defendant Northwestern Bell Telephone Co.'s (Northwestern Bell) motion to dismiss the complaint in its entirety. The facts of the case are set forth in the Court's prior order and will not be extensively reprised here. In brief, plaintiffs allege that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the Minnesota Public Utilities Commission (MPUC), the regulatory body which sets rates which Northwestern Bell may charge for the goods and services it provides. Plaintiffs allege that from early 1980 and through the present Northwestern Bell has offered benefits, rewards and consideration to certain MPUC commissioners, including bribes, offers of employment and various gifts, free meals, and emoluments, with intent to influence these commissioners in the performance of their duties. In its November 21 memorandum and order, the Court found that plaintiffs had failed to allege a "pattern" of racketeering within the meaning of the RICO statute, and accordingly granted defendant's motion to dismiss the RICO counts of plaintiffs' amended complaint. The Court dismissed plaintiffs' pendent state law claim without prejudice. Plaintiffs now bring this motion for reconsideration.

DISCUSSION

A. Pattern of Racketeering

It is by now well established that in order to establish a civil RICO cause of action plaintiffs must prove the existence of

four elements: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). The RICO act defines "pattern of racketeering injury" in the following terms:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5). In *Sedima* the Supreme Court pointed out that while at least two acts of racketeering are necessary to form a pattern, two acts may not be sufficient. *Sedima*, 105 S.Ct. at 3285 n.14. Rather, it is the factor of continuity plus relationship which combines to produce a pattern. *Sedima*, 105 S.Ct. at 3285 n.14, *citing* S.Rep.No. 91-617, p. 158 (1969). In passing, the *Sedima* majority noted that the failure of Congress or the courts to develop a meaningful concept of "pattern" has contributed to the expansive potential of RICO's application, and suggested that a stricter interpretation of the pattern requirement might be the key to arresting civil RICO's explosive growth. *Sedima*, 105 S.Ct. at 3287. Subsequently, the lower courts have accepted the Supreme Court's invitation to flesh out the pattern element, albeit with varying results. *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198, 1200 (D.S.N.Y. 1986) (numerous courts have struggled with establishing a definition of pattern of racketeering activity in light of the *Sedima* Court's reasoning and the clear objectives of the RICO statute); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1280 n.7 (5th Cir. 1986) (Fifth Circuit directed its lower courts to consider more rigorous interpretation of the pattern requirement).

In the language of one of the more trusted sources for the definition of English words, a "pattern" is defined as: "an arrangement or composition that suggests or reveals a design; a configuration. . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY (C & G Merriam Co. 1961), *cited in United States v. Freshie Co.*, 639 F.Supp. 442, 444 (E.D.Pa. 1986). The Omnibus Crime Control Act of 1970 provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e), *cited in Sedima*, 105 S.Ct. at 3285 n.14. The courts have suggested that to compose a pattern "the acts complained of must be related to and similar in purpose, and must be part of an ongoing series of acts, rather than separate incidents in a series of sporadic activities." *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 808 (E.D.La. 1986), *citing Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). In their search for a meaningful interpretation of "pattern" the courts have focused on the dual requirements of "relationship" and "continuity" highlighted by the *Sedima* majority.

1. *Relationship*

Relationship generally has proved the less problematic of the prongs enunciated by *Sedima*. It has been stated that to be related, the predicate acts of a RICO claim must involve common perpetrators, common methods of commission, common victims, and a common motive or purpose. *Medallion TV Enterprises, Inc. v. SelecTV of California, Inc.*, 627 F.Supp. 1290, 1296 (C.D.Cal. 1986); *Graham v. Slaughter*, 624 F.Supp. 222, 225 (N.D.Ill. 1985); *Allington v. Carpenter*, 619 F.Supp. 474,

478 (C.D.Cal. 1985). Relationship requires that the acts of racketeering be related to the operation of the enterprise, that is, sufficiently related to the statutorily proscribed conduct. *Papai v. Cremosnik*, 635 F.Supp. 1402, 1407-08 (N.D.Ill. 1986); *Technology Exchange Corp. of America, Inc. v. Grant County State Bank*, 646 F.Supp. 179, 183 (D.Colo. 1986). As stated by the United States Court of Appeals for the Seventh Circuit in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), "[r]elationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct." *Morgan*, 804 F.2d at 975.

In this case, it is clear that plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering enumerated in their amended complaint. Plaintiffs have identified common prepetrators, Northwestern Bell and certain of its officers and agents; common victims, Northwestern Bell's ratepayers; and a common motive or purpose, improper influence of MPUC commissioners through bribes, gifts and assorted emoluments. Plaintiffs have alleged that the acts of racketeering are related to the operation of the enterprise, and that each of these acts was directed toward a similar end. In this case, as in most reported RICO decisions, plaintiffs have little difficulty surmounting the "relationship" barrier.

2. *Continuity*

As the Court noted in its November 21 order, continuity presents a more problematic analysis, both on the facts of this case and in general. At a minimum, continuity means that plaintiffs must allege "more than sporadic or isolated activity." *Graham*, 624 F.Supp. at 225. The term pattern "connotes a multiplicity of events: . . . The continuity inherent in the term presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity." *Northern Trust*

Bank/O'Hara, N.A. v. Inryco, Inc., 615 F.Supp. 828, 831 (N.D. Ill. 1985). In this respect, ongoing criminal activity or at least a threat of ongoing criminal activity is a key indicium of continuity. *Ghouth v. Conticommodity Services, Inc.*, 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). One court has stated that in determining whether continuity exists, courts should look to "the purposes, results, participants, victims and methods of commission." *Technology Exchange*, 646 F.Supp. at 183-84. Quite obviously, these are identical to the factors to be assessed in gauging "relatedness." The "inherent contradiction" which exists between the dual requirements of relatedness and continuity is perhaps resolved by recognizing that relatedness requires proof that the predicate acts are "sufficiently connected," while, in contrast, continuity requires proof that the predicate acts are "sufficiently differentiated." *Freshie*, 639 F.Supp. at 445; *Allington*, 619 F.Supp. at 478. To prove relatedness, plaintiffs must demonstrate that the predicate acts evince common perpetrators, victims, methods, motive or purpose. To prove continuity, plaintiffs must demonstrate that the racketeering acts are "sufficiently unconnected in time or substance to warrant consideration as separate criminal episodes." *Allington*, 619 F.Supp. at 478. As stated in *Freshie*:

> [A]n inherent tension exists between the dual requirements of relatedness and continuity. Viewed on a continuum, these two requirements must reach some equitable balance to form a "pattern." . . . [T]he acts must be "sufficiently connected, but also sufficiently differentiated." . . . [A]s the acts become more related, the same transactions lose some of their separateness. On the other hand, if a series of predicate acts satisfied the requirement of "separate criminal episodes," then those acts

might well not meet the relatedness requirement, being too disjointed (different subject matter) and too remote (in time).

Freshie, 639 F.Supp. at 445 (citations omitted).

The United States Court of Appeals for the Eighth Circuit has had an opportunity to address the continuity requirement in four post-*Sedima* decisions. In *Alexander Grant and Co. v. Tiffany Industries, Inc.*, 770 F.2d 717 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 799 (1986), the Court stated in dictum that plaintiff's allegations of twenty-six acts of mail fraud and four acts of wire fraud were sufficient to demonstrate a pattern of racketeering activity. The Court declared:

> The number and nature of acts, together with allegations demonstrating their similar purposes, results, participants, victims, and methods of commission, bespeak a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima* that RICO not be extended to reach sporadic activity.

Alexander Grant, 770 F.2d at 718 n.1.

In *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) the court found that plaintiff's allegations of several related acts of mail and wire fraud in furtherance of a scheme to convert gas from plaintiff's pipeline did not rise to the level of a "pattern" of racketeering activity. The Court declared that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not bespeak "continuity" in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257. The court concluded:

> The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On

> the facts of this case, we agree with the court's conclusion in *Northern Trust Bank/O'Hara, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), plaintiff offered proof of several acts of wire or mail fraud related to a single scheme to draw letters of credit. The Eighth Circuit found that, because defendants' fraudulent acts were undertaken as part of a "common purpose of scheme," there was no showing of continuity, absent proof that the defendants "had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, 800 F.2d at 210. In the absence of allegations of like wrongful activity in the past or other wrongful activity elsewhere, plaintiff's RICO claim was found to be fatally defective.

The most recent Eighth Circuit teaching on the subject is *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986). In *Deviries* plaintiff alleged that the defendant had made misrepresentations to secure his securities brokerage account and then "churned" the account over a six-year period. The Eighth Circuit found that each of the predicate acts alleged were committed in furtherance of a single "scheme," and that accordingly, plaintiff had "failed to allege the continuity necessary to establish a 'pattern' of racketeering activity." *Deviries*, 805 F.2d at 329. Following *Superior Oil* and *Holmberg*, the *Deviries* court found plaintiff's allega-

tions of a "pattern" insufficient absent an "allegation that [defendants] had engaged in similar endeavors in the past or that they were engaged in other criminal activities." *Deviries*, 805 F.2d at 329.

As a number of courts and commentators have noted, the Eighth Circuit's approach to the pattern requirement lies at one end of the spectrum of post-*Sedima* RICO "pattern" jurisprudence. What is required to allege a pattern of racketeering activity in the Eighth Circuit is proof of multiple criminal schemes or episodes, that is, that defendants have engaged in similar criminal activities in the past or are engaged in other criminal activities elsewhere. Critics of this approach point out that it appears to run contrary to the *Sedima* court's directive that "RICO is to 'be liberally construed to effectuate its remedial purposes,'" *Sedima*, 105 S.Ct. at 3286, *quoting* Pub.L. 91-452, § 904(a), 84 Stat. 947, and that "the imposition of a 'multi-scheme' requirement . . . could arbitrarily exclude large-scale frauds from [RICO's] scope simply because the actors' overall goal—while perhaps no less ambitious or ultimately harmful than a series of short-range illegal plots—happens to be a monolithic one." *McLendon v. the Continental Group, Inc.*, No. 83-1340, slip op. at 8 (D.N.J. July 31, 1986); *Morgan*, 804 F.2d at 975. Advocates of the Eighth Circuit's restrictive approach contend that "[t]his construction of the pattern requirement is the only construction that effectuates Congress' intent to avoid imposition of RICO liability where there have been only isolated or sporadic criminal acts." *Frankart*, 632 F.Supp. at 1201. *See, e.g., Simon*, slip op. at 9 (no pattern where plaintiff does not allege that defendants concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity); *Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 slip op. (D.N.J. Oct. 11, 1985) (a series of fraudulent mailings did not

constitute a pattern of racketeering activity where mailings were all aimed at implementing a single fraudulent scheme); *Medical Emergency Service Association S.C. v. Foulke*, CIVIL 85-4064, slip op. (N.D.Ill. Jan. 7, 1986) (multiple mailings in furtherance of a single criminal episode are insufficient to establish a pattern of racketeering activity); *Dunham v. Independence Bank of Chicago*, 629 F.Supp. 983 (N.D.Ill. 1986) (no pattern where each of the predicate acts occurred in the execution of a single, though repeated, substantive misrepresentation); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418 (W.D.Okla. 1985) (no pattern where claim arises from one engagement to perform one bank audit); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern); *Rich Mail Kitchens, Inc. v. Pennsylvania Lumbermens Mutual Insurance Co.*, 641 F.Supp. 297 (E.D.Pa. 1986) (one isolated fraudulent scheme, even if containing more than one fraudulent act, is not enough to constitute a pattern); *Richardson Greenshields of Canada Ltd. v. Patel*, 643 F.Supp. 672 (S.D.N.Y. 1986) (no pattern where predicate acts were part of a single, unified activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern).

At the other extreme are those cases, most notably the decision of the United States Court of Appeals for the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), holding that a showing of two related predicate acts is sufficient. *See also Trak Microcomputer Corp. v. Wearne Bros.*, 628 F.Supp. 1089 (N.D.Ill. 1985); *Conan Properties, Inc. v. Mattel, Inc.*, 619 F.Supp. 1167 (S.D.N.Y. 1985); *Systems Research, Inc. v. Random, Inc.*, 614 F.Supp. 494

(N.D.Ill. 1985). Critics of this approach point out that it will invariably "sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions." *Exeter*, 604 F.Supp. at 1554.[1]

A number of courts, most notably the United States Court of Appeals for the Eleventh Circuit in *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), have attempted to steer a middle ground, holding that a single fraudulent scheme which encompasses various predicate acts over a significant period of time satisfies the pattern requirement. *See Freshie*, 639 F.Supp. at 444. Under this approach, it is not necessary to allege multiple criminal schemes, provided that plaintiff alleges an "open-ended scheme" over an extended period of time evincing criminal activity which is continuous in nature rather than isolated. *B.J. Skin & Nail Care, Inc. v. International Cosmetic Exchange, Inc.*, 641 F.Supp. 563, 566 (D.Conn. 1986). In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit appeared to adopt this intermediate approach, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions 'somewhat separated in time and place.' ' . . . ." *Morgan*, 804 F.2d at 975. Advocates of the intermediate approach, dubbed the "multiple episodes plus ongoing course of conduct" standard, *Gidwitz v. Stirco, Inc.*, 646 F.Supp. 825, 829 (N.D.Ill. 1986), contend that it deflects

[1] The *R.A.G.S.* opinion is unpersuasive for another reason. In the subsequently decided *Smoky Greenhaw* opinion the Fifth Circuit seemed to suggest that the nature of the pattern requirement remained an open question, without reference to *R.A.G.S. See Smoky Greenhaw*, 785 F.2d at 1280 n.7.

"garden variety" commercial fraud cases while sweeping into the RICO net those cases which are large in scale albeit monolithic. *See, e.g., Temporaries, Inc. v. Maryland National Bank*, 638 F.Supp. 118 (D.Md. 1986); *Louisiana Power*, 642 F.Supp. at 808; *Freshie*, 639 F.Supp. at 445.

Plaintiffs urge the Court to adopt the intermediate approach above-referenced and to find that because the amended complaint includes allegations of various predicate acts committed over an extended, identifiable period of time, the continuity aspect of the pattern requirement is met, notwithstanding that these predicate acts transpired in connection with a single "scheme." As stated by the Court in its prior order, were the Court writing on a clean slate these arguments might well be persuasive. The Eighth Circuit has thrice held, however, that continuity requires proof of multiple criminal episodes. *Superior Oil*, 785 F.2d at 257; *Holmberg*, 800 F.2d at 210; *Deviries*, 805 F.2d at 329. This unbroken line of authority the Court is not free to disregard. Here, plaintiffs' amended complaint includes no allegations of separate transactions—merely separate predicate acts—and no allegations that these predicate acts have independent harmful significance. Each of the predicate acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. The Court is obliged to turn to the language of *Superior Oil, Holmberg*, and *Deviries*: plaintiffs simply have not alleged that defendants have engaged in like activities in the past or that they are engaged in other criminal activities elsewhere.

The approach adopted by the Eighth Circuit is designed to give meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. *Allington*, 619 F.Supp. at 478, *citing* 116 Cong.Rec. 35193 (statement of Rep. Poff) (RICO not aimed at the isolated offender). More-

over, the requirement that plaintiffs in a civil RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term pattern. *Medallion TV*, 627 F.Supp. at 1296. A "pattern" requires more than one single criminal episode carved into distinct predicate acts. *Commercial Agropequaria Menichetti Fuente S.A.C.I. v. Heather Trading Corp.*, 85 CIVIL 3240, slip op. at 8 (S.D.N.Y. Mar. 27, 1986), *cited at Richardson*, 643 F.Supp. at 674.[2] Although plaintiffs have alleged numerous predicate acts over an extended period of time, it is clear that these acts were part and parcel of a unified, monolithic criminal scheme. The predicate acts alleged by plaintiffs are not "sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes." *Medallion TV*, 627 F.Supp. at 1297.

Plaintiffs urge the Court to depart from the multiple criminal schemes test adopted by the Eighth Circuit and to focus instead on factors such as the duration of the alleged racketeering activity and the number of victims. A number of courts and commentators have noted that an interpretation of "pattern" which turns on fine distinctions between single or multiple "episodes" or "schemes" is ill-suited to accomplishment of RICO's central purpose, the eradication of "traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises." ABA Ad Hoc Civil Task Force 71, *quoted in Sedima*, 105 S.Ct. at 3289 (Powell, J., dissenting). These courts have focused analysis on several relevant factors, including:

[2] As stated by Justice Powell in his *Sedima* dissent, "[t]he definition of pattern may . . . logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a 'pattern' to be proved." *Sedima*, 105 S.Ct. at 3289 (Powell, J. dissenting).

(1) *Duration*—One indicium of "continuity" is the duration of the alleged criminal activity. To the extent plaintiff alleges criminal activity which is ongoing over an identified period of time, the possibilities are enhanced that defendants are indeed engaged in traditional mobster activity or comparable ongoing structured criminal enterprises. Conversely, where the predicate acts are of a finite and limited duration, directed at a specific goal, the likelihood increases that ordinary commercial fraud is involved.

(2) *Threat of Ongoing Criminal Activity*—Hand-in-hand with duration, which focuses on past events, is the threat of ongoing criminal activity, which focuses on the likelihood that defendant's criminal activities will continue into the future. Absent allegations that defendants' scheme has the potential to continue indefinitely a strong likelihood exists that the wrongs alleged are isolated, not systematic.

(3) *Multiple Victims*—One characteristic of traditional mobster activity or comparable ongoing structured criminal enterprises is the presence of many victims. "The repetition of an act taken against a single victim . . . suggests no expansion, no ongoing design, no continuity, such as was the target of Congress" in enacting RICO. *Satellite Financial Planning Corp. v. First National Bank of Wilmington*, 646 F.Supp. 118, 120 (D.Del. 1986); *Kriedtbank*, slip op. at 9.

(4) *Independent Harmful Significance*—Some courts have looked to the independent harmful significance of the predicate acts alleged by plaintiffs as an indicium of continuity. A predicate act has independent harmful significance if, standing alone, it brings above the injury complained of. A predicate act lacks independent harmful significance if it brings about injury only in conjunction with other predicate acts.

(5) *Methods of Commission*—One factor frequently cited by the courts is the method of commission employed by the de-

fendants. This factor is perhaps less useful than the others, in that it is well-accepted that the mere fact that defendants have employed more than one fraudulent method does not establish a pattern.

(6) *Regular Part of Defendants' Business*—One court has suggested that "RICO's purposes are best served by also requiring that . . . a reasonable inference can be made that these episodes were not an aberration in the way a defendant conducted his business. Rather, the pattern made up of multiple episodes must be a regular part of the way a defendant does business and in that sense, ongoing." *Papai*, 635 F.Supp. at 1412.

The above-referenced factors have been highlighted by some courts as having relevance to the pattern inquiry. The courts have noted that these factors are not exhaustive and that all factors need not be proven in each case. The pattern question must inevitably be decided on a case-by-case basis. *Ghouth*, 642 F.Supp. at 1337. The intent of this analysis is to "flesh out the identifying characteristics of the [term] 'episode,' using the concept of 'continuity' as a guidepost." *Ghouth*, 642 F.Supp. at 1339.

Even assuming that these factors have relevance, the Court would still be constrained to find that plaintiffs have not alleged a pattern of racketeering activity. Plaintiffs have alleged criminal activity of long duration. Whether plaintiffs have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. Plaintiffs have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produced their injuries. Plaintiffs have alleged various methods of commission. It cannot be said, however, that the alleged "pattern" of predicate acts is a "regular part of the way" defendants conduct their business. On balance, the Court finds that, applying the enumerated factors, plaintiffs' allegations do not fit the RICO paradigm. Of course, in the Eighth Circuit the governing standard is the multiple criminal episodes test of *Superior Oil*, *Holmberg*, and *Deviries*. Applying this test, the Court finds that plaintiffs have not alleged a pattern of racketeering activity. Accordingly, plaintiffs' motion for reconsideration of the Court's RICO ruling is denied.

3. *Enterprise—Person*

Plaintiffs' Count II arises under RICO, 18 U.S.C. § 1962(a). For purposes of their section 1962(a) claim, plaintiffs allege that Northwestern Bell is both a "person" within the meaning of 18 U.S.C. § 1961(3) and an "enterprise" within the meaning of 18 U.S.C. § 1961(4). In its November 21 order the Court noted that the Eighth Circuit has ruled that for purposes of a claim arising under section 1962(c) the RICO enterprise must be distinct from the RICO person. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *on rehearing*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1983). With this in view, the Court stated that in a section 1962(a) action as in a section 1962(c) action plaintiffs must allege and prove a RICO "enterprise" separate and distinct from the RICO "person."

A number of courts have found that the person and enterprise need not be distinct in a section 1962(a) action. *See, e.g., B.F. Hirsch, Inc. v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 55 U.S.L.W. 2364-65 (9th Cir. Dec. 24, 1986). Other courts have ruled that the distinction pertains in a section 1962(a) action. *United States*

v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982); *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985). The Court continues be of the view that the RICO person and enterprise must be distinct for purposes of a section 1962(a) claim. In addition to the reasons cited in the Court's November 21 order, the Court notes the following:

(1) In the absence of "very explicit statutory language," the courts are not inclined to accept the proposition that a civil RICO defendant could participate with itself in the illicit use or investment of income derived from a pattern of racketeering activity. *Computer Sciences Corp.*, 689 F.2d at 1183.

(2) Because civil RICO was intended to provide a remedy against the infiltrator of legitimate business, and not against the infiltrated enterprise, a separate enterprise-person requirement is appropriate in a 1962(a) action as in a 1962(c) action. *Rush*, 628 F.Supp. at 1197.

(3) Perhaps most significantly, the construction of section 1962(a) urged by plaintiffs would fly in the face of ongoing efforts by Congress and the courts to curtail the expansive reach of civil RICO.

For these reasons, plaintiffs' motion for reconsideration of the Court's 1962(a) statements is denied.

4. *Filed Rate Doctrine*

In its November 21 order the Court found that the federal "filed rate" doctrine precludes plaintiffs' cause of action. Plaintiffs urge the Court to reconsider its position. Plaintiffs have not, however, cited any new authority or arguments in support of its motion for reconsideration. Accordingly, plaintiffs' motion will be denied.

Based on the foregoing, and upon review of all files, records and proceedings herein,

IT IS ORDERED that plaintiffs' motion for reconsideration is in all respects denied.

HARRY H. MacLAUGHLIN
Judge
United States District Court

DATED: February 18, 1987.

APPENDIX E

UNITED STATES DISTRICT COURT
District of Minnesota
Fourth Division

CIVIL 4-86-546

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Plaintiffs,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Defendants.

Mark Reinhardt, Susan Bedor, Reinhardt & Anderson, 1014 Conwed Tower, 444 Cedar Street, St. Paul, MN 55101, and John Cochrane, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, MN 55101, for plaintiffs.

John D. French, John F. Beukema, James L. Volling, Joseph H. Otterstetter, Faegre & Benson, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402, and Stephen T. Refsell, General Attorney, Northwestern Bell Telephone Company, Room 1800, 200 South Fifth Street, Minneapolis, MN 55402 for defendants.

MEMORANDUM AND ORDER

This matter is before the Court on defendant Northwestern Bell Telephone Company's motion to dismiss and/or for summary judgment, and on plaintiffs' motion to strike defenses.

Plaintiffs' motion will be denied. Defendant's motion to dismiss will be granted.

FACTS

Plaintiff H.J., Inc. is a Minnesota corporation with its principal place of business in Burnsville, Minnesota. Plaintiffs Kirk Dahl, Mary Krugen, Larry Krugen, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, and Thomas J. Mott are each Minnesota residents. Each of the named plaintiffs has purchased telecommunications goods and services from Northwestern Bell. Defendant Northwestern Bell Telephone Co., a subsidiary of U.S. West, Inc., is a telecommunications concern supplying goods and services in interstate commerce. Defendants Harry Crump, Leo Adams, Barbara Beerhalter, Roger Hanson, and Juanita Satterlee are present or former members of the Minnesota Public Utilities Commission (MPUC). Defendant Robert Johnson is counsel for the Minnesota Telephone Association. Ray Larson, Roy Weir, Thomas Madison, and Gene Bier are officers and/or employees of Northwestern Bell.

This is a class action arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Plaintiffs allege that defendants committed acts in violation of 18 U.S.C. §§ 1962(a), (b), and (c) and further allege that defendants conspired to commit racketeering acts in violation of 18 U.S.C. § 1962(d). Plaintiffs also bring state law claims pursuant to the Court's pendent jurisdiction, alleging acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and the common law of bribery.

The gist of plaintiffs' cause of action is an allegation that Northwestern Bell, by and through its corporate agents, initiated a scheme designed to illegally influence various members of the MPUC, the regulatory body which sets rates which Northwestern Bell may charge for the goods and services which it provides. Plaintiffs allege that from July, 1980 and through the present, Northwestern Bell has offered, promised, or given, directly or indirectly, certain benefits, rewards, and consideration to duly appointed MPUC commissioners, with the intent to influence said commissioners with respect to the performance of their duties as officers of the MPUC. Amended Complaint ¶ 30. Specifically, plaintiffs allege the following corrupting acts:

(1) MPUC commissioner Hanson negotiated with Northwestern Bell officials including Gene Bier, Northwestern Bell's chief executive officer, regarding an offer of employment made to Hanson by Northwestern Bell in November, 1984, at a time when Hanson was still an MPUC commissioner. Amended Complaint ¶ 37.

(2) MPUC commissioner Hanson received illicit payments from Northwestern Bell of $30,000 during 1985. The illicit payments were made to Robert Johnson, counsel for the Minnesota Telephone Association, and passed on to Hanson. Amended Complaint ¶ 38. These illicit payments continued after Hanson was reappointed MPUC commissioner on November 25, 1985. Amended Complaint ¶ 39.

(3) Northwestern Bell executives Thomas Madison and Roy Weir made an offer of employment to MPUC commissioner Juanita Satterlee while Satterlee was still a commission member. Amended Complaint ¶ 40.

(4) Northwestern Bell made illicit payments to Satterlee of $106,129 during the period 1983-1984, while Satterlee was an MPUC commissioner. Amended Complaint ¶ 41.

(5) Northwestern Bell officer Larson provided MPUC commissioner Crump with a free plane ride from Oklahoma to Minneapolis on June 26, 1985. Amended Complaint ¶ 31.

(6) MPUC commissioners Crump and Beerhalter were provided with an all-expenses-paid excursion to Canterbury Downs in September, 1985, courtesy of Northwestern Bell. Amended Complaint ¶¶ 32, 36.

(7) MPUC commissioner Crump was provided with tickets to various Broadway plays by Northwestern Bell officials between 1984 and the present. Amended Complaint ¶ 33.

(8) MPUC commissioners Crump and Adams were provided with free tickets to various sporting events by Northwestern Bell officials during the period 1981 to the present. Amended Complaint ¶¶ 34, 35.

(9) During the period July, 1980 to the present, Northwestern Bell has expended thousands of dollars for various gifts, emoluments, meals, and parties for MPUC commissioners. Amended Complaint ¶ 42.

Plaintiffs' complaint is in five counts. Count I is a state law claim alleging that the defendants bribed MPUC commissioners by offering to those commissioners benefits, rewards, and consideration to which they were not entitled. Plaintiffs seek civil recovery based on violation of the Minnesota criminal bribery statute, Minn. Stat. § 609.42, subd. 1(1) and (2), and for common law bribery. Count II is a RICO claim arising under section 1962(a). Count III arises under RICO section

1962(b), alleging that the defendants associated with the MPUC in unlawful racketeering activity. Count IV arises under RICO section 1962(c) and Count V is a conspiracy count arising under RICO section 1962(d). Each of the RICO counts involves an allegation that the defendants and the MPUC associated together for the purpose of unlawful racketeering activity.

Plaintiffs seek to recover compensatory damages, measured by the amount received by Northwestern Bell in excess of what would have been a fair and reasonable charge for telephone services. Plaintiffs also seek to recover punitive damages, treble damages pursuant to RICO, 18 U.S.C. § 1984(c), and an injunction prohibiting defendants from engaging in further unlawful activity.[1]

Defendant Northwestern Bell now brings this motion to dismiss and/or for summary judgment. Plaintiffs have filed a counter-motion to strike defenses.

DISCUSSION

A. *Timeliness*

As a threshhold matter, plaintiffs argue that defendant's Rule 12(b)(6) motion to dismiss is untimely. Defendant's motion was filed after defendant's answer to plaintiffs' amended complaint. Rule 12(b)(6) provides that a motion to dismiss for failure to state a claim upon which relief can be granted shall

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[1] The Court was pleased to note that on November 7, 1986 the MPUC voted to reconsider a $57.5 million rate increase granted to Northwestern Bell in 1984. As the Court noted at oral argument, the Commission appears to be an appropriate place to consider whether the alleged briberies and other improper contacts had any effect upon the rate increases granted to Northwestern Bell by the MPUC. The MPUC's decision to reopen the case means that the rate differentiations of which plaintiffs complain could be corrected by an MPUC decision to abrogate the 1984 rate increases. Minneapolis Star & Tribune, November 8, 1986, at 1, col. 4.

be made "*before* [responsive] pleading if a further pleading is permitted." Fed.R.Civ.P. 12(b)(6) (emphasis added). Rule 12 gives the defendant the option of raising a defense by motion or by the pleadings, however. Courts have discretion to allow 12(b)(6) motions if the defense has been previously included in the answer. 5 C.Wright, A.Miller & M.Kane, *Federal Practice and Procedure* § 1361 at 643 n.35. Here, defendant raised its defenses in its answer. In the exercise of the Court's discretion the defendant will be permitted to bring a Rule 12(b)(6) motion at this time.

B. *Motion to Strike Defenses*

Plaintiffs have brought a motion to strike defendants' third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth defenses. Plaintiffs' motion is brought pursuant to Fed.R.Civ.P. 12(f) which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed.R.Civ.P. 12(f). A Rule 12(f) motion to strike defenses is a drastic remedy which is disfavored by the courts and is infrequently granted. *Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 69 F.R.D. 1, 5 (D.Minn. 1975). A Rule 12(f) motion to strike will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. *Carter-Wallace, Inc. v. Riverton Laboratories, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

Plaintiffs have failed to show that the "drastic remedy" of striking defendants' defenses is appropriate in the case at bar. Each of the challenged defenses is facially valid. Accordingly, plaintiffs' Rule 12(f) motion to strike defenses will be denied.

C. *RICO*

In order to establish a RICO cause of action plaintiffs must prove the existence of four elements:

(1) conduct
(2) of an enterprise
(3) through a pattern
(4) of racketeering activity.

See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3285 (1985) (footnote omitted); *Simon v. Fribourg*, CIVIL 4-86-259, slip op. at 9 (D.Minn. Aug. 20, 1986). Defendant moves to dismiss plaintiffs' RICO claim on the ground that plaintiffs have failed to allege a "pattern" of racketeering activity.

1. *"Pattern" of Racketeering Activity*

An essential element of the RICO civil cause of action is proof that defendants have engaged in a "pattern" of racketeering activity. The "pattern" requirement was subjected to a searching analysis in the Supreme Court's *Sedima* decision. The *Sedima* Court enunciated the following guiding principles:

> (1) two isolated acts of racketeering activity do not constitute a pattern;
>
> (2) it is the factors of *continuity plus relationship* which combine to produce a pattern;
>
> (3) the "pattern" element of the statute was designed to limit RICO's application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.

See Sedima, 105 S.Ct. at 3285 n.14.[2]

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[2] The *Sedima* Court made the following observations:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other pro-

The United States Court of Appeals for the Eighth Circuit has explored the meaning of "pattern" in a civil RICO context in two recent cases, *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) and *Holmberg v. Morrissette*, CIVIL Nos. 85-5138 and 85-5221 slip op. (8th Cir. Sept. 3, 1986). In *Superior Oil*, the plaintiff proved several related acts of mail and wire fraud in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The Eighth

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visions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). *See also id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) 18 USCS § 3575(e). This language may be useful in interpreting other sections of the Act.

Sedima, 105 S.Ct. at 3285 n.14.

Circuit explained that proof of a "pattern" of racketeering activity requires more than proof of one racketeering activity and the threat of continuing activity. It is the factor of "continuity plus relationship" which combines to produce a pattern. The court found that proof of a single fraudulent scheme, implemented by several fraudulent acts, does not constitute a "pattern" of racketeering activity for RICO purposes. While the "relationship" prong of the pattern test is met by proof of several related acts of mail and wire fraud, in the absence of proof that the defendants "had ever done these activities in the past . . . [or] that they were engaged in other criminal activities elsewhere," *Superior Oil*, 785 F.2d at 257, it could not be said that plaintiffs had proved "continuity" sufficient to establish their RICO claims. The court concluded:

> [Plaintiff] has, however, failed to prove the "continuity" sufficient to form a "pattern of racketeering activity." The actions of [defendants] comprised one continuing scheme to convert gas from [plaintiff's] pipeline. . . . On the facts of this case, we agree with the court's conclusion in *Northern Trust Bank /O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (D.C.Ill. 1985), that "[i]t is difficult to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode. * * * It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Superior Oil, 785 F.2d at 257 (footnote omitted).

In *Holmberg*[3] plaintiff offered proof of several acts of wire

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[3] In *Holmberg* the Eighth Circuit cited definitions of "pattern" drawn from the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3575(e), wherein Congress provided that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of

or mail fraud related to a common purpose or scheme. The Eighth Circuit found that plaintiff had satisfied the "relationship" prong of *Sedima*. As in *Superior Oil*, however, the Court found that plaintiff had not satisfied the "continuity" prong. Because defendants' acts of wire and mail fraud were undertaken as part of a common purpose or scheme, there was no showing of continuity, notwithstanding that the single fraudulent effort was implemented by several acts of wire or mail fraud. The court stated: "[t]here was no evidence that [the defendants] had engaged in like activities in the past or that they were engaged in other criminal activities." *Holmberg*, slip op. at 9. In the absence of proof of like past or other present fraudulent activity, plaintiffs' civil RICO cause of action was dismissed.

Distilled to their essence, *Sedima*, *Superior Oil*, and *Holmberg* give rise to the following governing principles. In order to establish a "pattern" of racketeering activity plaintiffs must allege and prove (1) relationship, and (2) continuity. The relationship prong is satisfied by proof of several related acts in furtherance of a single criminal scheme. *Superior Oil*, 785 F.2d at 257; *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, CIVIL No. 84-5156, slip op. at 51 (E.D.La. Aug. 15, 1986); *Frankart Distributors, Inc. v. RMR Advertis-*

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commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." The *Holmberg* court also looked to legislative history for guidance, citing the following definition of "pattern" drawn from Senate reports:

> The concept of "pattern" is essential to the operation of the statute . . . . The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

Holmberg, slip op. at 9, quoting S.Rep.No. 617, 91st Cong. 2d Sess. 158 (1969).

ing, Inc., 632 F.Supp. 1198 (S.D.N.Y. 1986); *Simon*, slip op. at 10. The continuity prong is satisfied by proof that the defendants have committed the same or similar racketeering activities in the past or are engaged in other criminal activities elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 9-10.[4]

Applying these principles to the case at bar, it is clear that plaintiffs have satisfied the first prong of the *Sedima* "pattern" test. Plaintiffs have alleged a "relationship" among and between the predicate acts of racketeering allegedly committed by defendants. Quite clearly, the acts allegedly committed by defendants—the alleged illicit distribution of tickets and other amenities to MPUC commissioners during the period 1981 to the present; uncompensated plane rides and excursions to Canterbury Downs during the same period; alleged illicit pay-

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[4] *See, e.g., Simon v. Fribourg*, CIVIL No. 4-86-259, slip op. at 9-10 (D.Minn. Aug. 20, 1986) wherein the court declared:

> "[P]roof of a 'pattern of racketeering activity' 'requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is the factor of *continuity plus relationship* which combines to produce a pattern.'" *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (emphasis in original) (quoting *Sedima*, 105 S. Ct. at 3275 n. 14). In *Superior Oil*, the plaintiff proved "several related acts of mail and wire fraud" in furtherance of a single crime—the conversion or theft of gas from plaintiff's pipeline. This satisfied the "relationship" prong of the *Sedima* test, but not the "continuity" prong. The failing in plaintiff's evidence was its inability to demonstrate that defendants had engaged in any other criminal activity. *Superior Oil*, 785 F.2d at 257.

Simon, slip op. at 9-10. In *Simon* the court found that plaintiff had failed to allege a civil RICO claim because the racketeering acts alleged by plaintiff were "all committed in furtherance of a single criminal act." *Simon*, slip op. at 10. In the absence of proof that the defendants had "concocted a similar scheme in any other year or that they were otherwise involved in any criminal activity" plaintiff's RICO claims must fail, the court found. *Simon*, slip op. at 10.

ments and promises of employment to MPUC commissioners Hanson and Satterlee—were related acts in furtherance of a single alleged criminal scheme, *i.e.*, all were designed to influence MPUC commissioners on behalf of Northwestern Bell.

As to the "continuity" prong of the *Sedima* test, however, plaintiffs' cause of action is much more problematical. While plaintiffs have alleged the existence of several fraudulent acts, each of these acts was committed in furtherance of a *single fraudulent scheme*. Here, as in *Superior Oil*, *Holmberg*, and *Simon*, there simply are no allegations that the defendants have engaged in "like activities in the past" or that defendants are engaged in "other criminal activities" elsewhere. *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10; *Simon*, slip op. at 10. The *Superior Oil-Holmberg* construction of the *Sedima* "pattern" test is extremely restrictive—in order to establish a pattern of racketeering activity plaintiffs must allege and prove multiple illegal schemes, of which the case at bar presents a separable episode. Each of the fraudulent acts alleged by plaintiffs was committed in furtherance of a single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers. Plaintiffs do not allege that the defendants have engaged in like wrongful activity in the past or are engaged in other wrongful activity elsewhere. *See Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 832 (N.D.Ill. 1985) (the common sense interpretation of "pattern" implies acts occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity). Absent allegations of separable criminal episodes, plaintiffs' cause of action simply does not fit the RICO paradigm—the infiltration of legitimate business by criminal conduct which embraces criminal acts that have the same or similar purposes, results, participants,

victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. It is apparent that plaintiffs have attempted to splinter a series of related acts into a civil RICO cause of action. *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F.Supp. 1418, 1423 (W.D.Okla. 1985). As such, plaintiffs' allegations fall short of establishing a "pattern" within the meaning of the RICO statute. Here, as in *Superior Oil* and *Holmberg*, "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'" *Superior Oil*, 785 F.2d at 257; *Holmberg*, slip op. at 10. *See, e.g., Allington v. Carpenter*, 619 F.Supp. 474 (C.D.Cal. 1985) (three acts of wire fraud in connection with a single isolated fraudulent scheme comprised a single criminal episode rather than a "pattern" of racketeering activity); *Morgan v. Bank of Waukegan*, 615 F.Supp. 836, 838 (N.D.Ill. 1985) (single plot spread over several years does not satisfy the pattern requirement); *Cullen v. Nassau County Republican Committee*, II RICO Law Rptr. 564 (E.D.N.Y. 1985) (to establish pattern plaintiffs must show that crimes constituted part of a larger pattern of criminal activity); *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547 (D.Mass. 1985) (two acts of mail fraud in connection with the purchase of a single mortgage does not constitute a pattern); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa. 1981) (multiple bribes received by councilman at a political fundraiser did not constitute a pattern).

Plaintiffs cite various decisions of other courts in other circuits where proof of various predicate acts engaged in over a significant period of time has been held to satisfy the "pat-

tern" requirement of civil RICO.[5] *See Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985) (defendants' act of mailing nine fraudulent tax returns over a nine-month period constitutes pattern of racketeering); *First Federal Savings and Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F.Supp. 427, 445 (S.D.N.Y. 1986) (predicate mail fraud acts arising out of a single scheme constitute pattern); *Pappagiannis v. Pontikis*, 105 F.R.D. 177 (N.D.Ill. 1985) (perpetration of fraud on more than one victim constitutes pattern); *United States v. Freshie Co.*, 639 F.Supp. 442 (E.D.Pa. 1986) (related but distinct methods of criminal activity engaged in over a substantial period of time rose to the level of a pattern of racketeering activity). Were the Court writing on a clean slate, these cases might well be persuasive. In the Eighth Circuit, however, the slate is far from clean.[6] *Superior Oil* and *Holmberg* are on all

[5] In a recent decision, *Morgan v. Bank of Waukegan*, 55 U.S.L.W. 2255 (7th Cir. Oct. 23, 1986), the United States Court of Appeals for the Seventh Circuit noted that the "continuity" aspect of the pattern requirement in the aftermath of *Sedima* footnote 14 has created a conflict among the circuits. The Eleventh Circuit has rejected the proposition that the predicate acts must occur in different criminal episodes or schemes, *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), while in contrast the Eighth Circuit has held that where all predicate acts were committed in furtherance of a single scheme the continuity requirement has not been met, as discussed above. In *Morgan* the Seventh Circuit elected to steer the middle ground, holding that "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions 'somewhat separated in time and place.'' . . .

[6] One court has identified three positions which the courts have taken in construing the continuity and relationship test. At one extreme, plaintiff is required to prove that the defendant was engaged in multiple illegal schemes. This is the position taken by the Eighth Circuit in *Superior Oil* and *Holmberg*. At the other extreme, courts have held that allegations of two related predicate acts is sufficient. An intermediate position taken by some courts requires proof of multiple criminal episodes evincing an ongoing practice or activity. *See Louisiana Power and Light*, slip op. at 52-53.

fours with the instant case. Under *Superior Oil* and *Holmberg*, plaintiffs have failed to show the requisite "continuity." Accordingly, plaintiffs' RICO claims must be dismissed.

Although plaintiffs' failure to satisfy the continuity prong of the *Sedima* pattern test is fully dispositive of plaintiffs' RICO claims, in the interest of thoroughness, certain of defendant's remaining arguments for dismissal will be briefly addressed.

2. *Enterprise-Person Distinction*

RICO was passed as part of the Organized Crime Control Act. *United States v. Hartley*, 678 F.2d 961, 987 (11th Cir. 1982). Its primary purpose was "to eradicate organized crime and corruption." *United States v. Lee Stroller Enterprises, Inc.*, 652 F.2d 1313, 1317 (7th Cir. 1981). In *United States v. Turkette*, 452 U.S. 576 (1981), the United States Supreme Court interpreted RICO as requiring proof of an "enterprise" engaged in a "pattern of racketeering activity." 452 U.S. at 583. "Enterprise" as defined in 18 U.S.C. § 1961(4) "includes any partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." Under *Turkette*, the existence of such an enterprise must be established by "evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. Moreover, the enterprise must be shown to have an existence "separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583; *Bennet v. E.F. Hutton, Inc.*, 597 F.Supp. 1547, 1559 (N.D.Ohio 1984).

Defendant moves for dismissal of plaintiffs' Count II on the ground that Count II names Northwestern Bell as both the "person" and the "enterprise" for purposes of plaintiffs' section 1962(a) claim. Defendant argues that Northwestern Bell cannot be both the "person" and the "enterprise" and that Count II is thus fatally defective.

RICO proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering. *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982). While some courts have held that a legal entity or formal enterprise which has actively participated and benefited from a pattern of racketeering activity can be named as *both* the enterprise and the person, *see United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), the majority position, and the one adopted in this circuit and district, is that the RICO "enterprise" cannot also be the RICO "person." *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982). In *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), the Eighth Circuit dismissed one count of plaintiff's complaint for failure to draw a distinction between the RICO enterprise and the RICO person. The *Bennett* ruling was reaffirmed in *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *vacated on other grounds and remanded for reconsideration in light of Sedima*, 105 S.Ct. 3550 (1985), *on remand* 770 F.2d 717 (1985), where the court stated:

> We do observe that [plaintiff's] original complaint alleges that [defendant] is both a "person" and an "enterprise" within the meaning of section 1962(c). It was precisely because of the possibility of such an identity

> that we held that count II of the complaint in *Bennett v. Berg* [citation omitted] failed to state a claim.

In *Minnesota Odd Fellows Home Foundation v. Engler & Budd Co.*, 630 F.Supp. 797 (D.Minn. 1986), the court found that "in the Eighth Circuit, it is necessary to allege an 'enterprise' separate from the 'person' who allegedly associates with the enterprise." *Odd Fellows*, 630 F.Supp. at 800, *citing Bennett v. Berg*, 685 F.2d at 1089. Because plaintiff in that case had failed to allege the existence of an "enterprise" separate and distinct from the "person" associated with the enterprise, the court dismissed plaintiff's RICO claims.

Plaintiffs' Count II alleges:

> 48. Northwestern Bell Telephone Company is a person within the meaning of 18 U.S.C. 1961(3).
>
> 49. The person referred to in paragraph 48 is also an ongoing enterprise within the meaning of 18 U.S.C. 1961(4).

Amended Complaint ¶¶ 48, 49. Quite clearly, plaintiffs have failed to allege a RICO "enterprise" separate and distinct from a RICO "person." Plaintiffs argue, however, that *Bennett* is not controlling in that the *Bennett* plaintiff's cause of action arose under section 1962(c) of RICO, whereas plaintiffs' Count II arises under section 1962(a). Some courts have held that in actions arising under section 1962(a) the enterprise and the person need not be distinct. *See, e.g., B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Freshie Co.*, 639 F.Supp. 442 (E.D.Pa. 1986). Other courts have held that the person-enterprise distinction pertains to 1962(a) actions as well as 1962(c) actions. *See, e.g., Kredietbank, N.V. v. Joyce Morris, Inc.*, CIVIL No. 84-1903 (D.N.J. Jan. 9, 1986); *Rush v. Oppenheimer & Co.*, 628 F.Supp 1188, 1196-98 (S.D.N.Y. 1985); *Computer Sciences*, 689 F.2d at 1190. The Court finds that in a 1962(a) action,

as in a 1962(c) action, plaintiff must allege the existence of an "enterprise" separate and distinct from the "person" identified, for the following reasons:

(1) Both 1962(a) and 1962(c) speak[7] of a "person" committing an unlawful act in connection with, but distinct from, an "enterprise." The consistent use of the two different terms "person" and "enterprise" throughout section 1962 indicates an intent to distinguish those actors throughout.

(2) As stated in *Bennett v. Berg*, "the RICO act proscribes conduct in which one party, the 'person' subject to the statute, acts upon an entity, the 'enterprise' . . . ." *Bennett*, 685 F.2d at 1061. In making this statement, the Eighth Circuit did not distinguish between (a) and (c) of section 1962, and nothing in *Bennett* gives rise to an inference that the court would view section (a) differently from section (c) for purposes of the separate person-enterprise requirement. Absent proof of a

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[7] RICO section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

The thrust of section 1962(a) is a proscription on the use or investment of illegally acquired funds in an enterprise.

RICO, section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The thrust of section 1962(c) is wrongful association with and control of an "enterprise' by a "person."

"person" acting upon an "enterprise," RICO is inapplicable, by virtue of the plain language of *Bennett*.

(3) Permitting a RICO cause of action where it is alleged that a corporate entity has conducted its own affairs through a pattern of racketeering activity, without any proof of infiltration of that enterprise by outside "persons," would not comport with congressional intention, inasmuch as one of the primary purposes of Congress in enacting RICO was to prevent the takeover of legitimate business by criminals and corrupt organizations. *B.F. Hirsch*, 751 F.2d at 633.

(4) Sections (a) and (c) of 1962 require the presence of the same elements—conduct of an enterprise, a pattern of racketeering activity, and a person. Only the relationship among these elements differs. Section (c) envisions racketeering acts conducted through an enterprise, whereas section (a) portrays the enterprise as the investment object of the criminal violators. Under either (a) or (c), the enterprise must be acted upon by a distinct "person."

(5) A construction of (a) which would obviate the separate enterprise-person requirement would be contrary to the restrictive reading of RICO given by the Eighth Circuit in *Superior Oil* and *Holmberg* and would "aggravate the already hopeless deviation of the RICO statute from its intended purpose in ferre''ng out organized crime." *Rush v. Oppenheimer & Co.*, 628 F.Supp. 1188, 1197 (S.D.N.Y. 1985).

Accordingly, based on the foregoing, the Court finds that plaintiffs' Count II is deficient as a matter of law.

D. *Filed Rate Doctrine*

Northwestern Bell argues that dismissal of plaintiffs' RICO claims is necessitated by the federal "filed rate" doctrine. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Supreme Court affirmed the

district court's dismissal of an action predicated on allegations that plaintiffs were forced to pay unreasonably high rates due to misrepresentations made by the defendant in rate proceedings before the Federal Power Commission (FPC). The Supreme Court held that the FPC had exclusive authority to determine a reasonable rate, and that the FPC's decision was conclusive. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), the Supreme Court reversed the trial court's award of damages measured by the difference between the price defendant had to plaintiff pursuant to Federal Energy Regulatory Commission (FERC) approved rates and the price defendant had paid others. The Court held that the "filed rate" doctrine forbids an award of damages based on an estimation of what the FERC "might have done had it been faced with the facts of [the] case." *Arkansas Gas*, 453 U.S. at 578-79. Northwestern Bell also relies on a line of federal antitrust cases, wherein the courts have held that antitrust plaintiffs are precluded from obtaining damages based on alleged illegal price fixing of utility rates, where the alleged damages are measurable by a comparison of the approved tariff and the tariff that would have been approved absent defendant's wrongdoing. *See Keough v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 106 S.Ct. 1922 (1986). Northwestern Bell argues that the *Keough* line of antitrust cases has relevance to a RICO action because (1) both RICO and the Clayton Act grant a cause of action to one "injured in his business or property," and because (2) both RICO and the Clayton Act provide for the award of treble damages. Defendant argues that the analogous nature of the Clayton Act and RICO remedies make the *Keough* line of cases of valid precedential authority in a RICO case.

Montana-Dakota, *Arkansas Gas*, and the *Keough* line of cases are squarely on point with plaintiffs' RICO claims. Plaintiffs seek to recover damages measurable by a comparison of MPUC-approved rates and the rates that would have been approved but for defendants' wrongdoing. Under the "filed rate" doctrine, plaintiffs' cause of action is not federally cognizable. The MPUC has exclusive authority to determine a reasonable rate, and the MPUC's decision is conclusive, subject to statutory process. Even assuming that plaintiffs have satisfied the "continuity" prong of *Sedima*, plaintiffs' action must be dismissed by virtue of the filed rate doctrine.

E. *State Law Claims*

Plaintiffs' Count I is a state law claim arising under Minn. Stat. § 609.42 and the common law of bribery. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the seminal case on the pendent jurisdiction of the federal courts, the United States Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. This bold statement has been subsequently qualified somewhat, the Court stating in *Rosado v. Wyman*, 397 U.S. 397 (1970) that whether to proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dismissed is discretionary with the trial court. 397 U.S. at 404; *Silva v. Vowell*, 621 F.2d 640 (5th Cir. 1980); *McGann v. Mungo*, 578 F.Supp. 1413 (D.S.C. 1982). Factors to consider in the exercise of the Court's discretion include considerations of judicial economy, convenience and fairness to litigants, and the avoidance of needless decisions of state law. *Gibbs*, 383 U.S. at 726. *Reyes v. Edmunds*, 416 F.Supp. 649 (D.Minn. 1976). *See also Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1346 (8th Cir. 1980)

(adopting *Gibbs* factors); *Pink Supply Corp. v. Hiebert, Inc.*, 612 F.Supp. 1334, 1347 (D.Minn. 1985).

Each of the relevant factors supports dismissal of plaintiffs' pendent state law claims. The case is still at an early stage, so that there has been no substantial commitment of federal judicial resources. *See, e.g., Briggs v. American Air Filter Co.*, 455 F.Supp. 179 (N.D.Ga. 1978) (no substantial commitment of judicial resources to nonremovable claims); *Houlihan v. Anderson-Stokes, Inc.*, 434 F.Supp. 1324, 1329 (D.D.C. 1977) (federal claims dismissed at early stage). Count I of the amended complaint raises an issue of first impression as to the implication of a private cause of action under the Minnesota criminal bribery statute. Needless decision of this unsettled state law issue is best avoided. *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Briggs*, 455 F.Supp. at 82 (novel questions of state law). In sum, no "unusual circumstances," *Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975), justifying federal jurisdiction over the pendent state claims are present here. Consequently, plaintiffs' Count I will be dismissed without prejudice as outside the subject matter jurisdiction of the Court. *See Kuhn v. National Association of Letter Carriers, Branch 5*, 570 F.2d 757, 761 (8th Cir. 1978) (district court did not have power to consider pendent state claim because it did not have jurisdiction over the federal claim).

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that:

1. plaintiffs' motion to strike defenses is denied;

2. defendant's motion to dismiss Counts II-V of plaintiffs' amended complaint is granted; and

3. defendant's motion to dismiss Count I of plaintiffs' amended complaint is granted, and Count I is dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

HARRY H. MacLAUGHLIN
Judge
United States District Court

DATED: November 21, 1986.